UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 357, AFL-CIO	)	
Petitioner/Cross-Respondent	)	Nos. 19-70322, 19-70575
v.	)	Board Case No. 28-CC-115255
NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	
and	)	
DESERT SUN ENTERPRISES LIMITED, d/b/a CONVENTION TECHNICAL SERVICES	)	
Intervenor	)	

INTERVENOR'S OPPOSITION TO MOTION OF THE NATIONAL LABOR RELATIONS BOARD CONSENTING TO AN ENTRY OF JUDGMENT AGAINST THE BOARD (DKT 47)

By the Order entered on March 21, 2019 as DKT entry 32 in Case No. 18-16244, this Court denied Desert Sun Enterprises Limited d/b/a Convention Technical Services' ("CTS'") motion to consolidate Cases Nos. 18-16244 and 19-70322, but directed that Cases Nos. 18-16244 and 19-70322 "will be calendared before the same merits panel." The Union filed a petition for review in Case No. 19-70322 and named CTS, the charging party before the Board and the plaintiff in

the District Court, as a Respondent. The Board filed a case seeking to enforce its order and in DKT 16, the Court consolidated Cases Nos. 19-70322 and 19-70575. By DKT 30 and DKT 34, this Court granted the Board's motion to remove CTS as a Respondent, but granted CTS's motion to intervene. Both the IBEW and CTS have filed their briefs in Cases Nos. 18-16244, 19-70322 and 19-70575.

The underlying dispute in all three cases arose from the IBEW's conduct on October 9, 2013, when it, after having been informed that CTS was performing work on a show at the Las Vegas Convention Center ("LVCC"), sent a letter to the Southern Nevada Trades Council seeking a strike sanction against CTS "for any and all jobs because of not paying area standards," and then sent the same letter to selected members of the Board of Directors of the Las Vegas Convention and Visitors Authority's ("LVCCA"). Neither the IBEW's strike sanction request letter nor the Trades Council's approval of a strike informed anyone that if the IBEW established a picket line, it would comply with the standards set out in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB No. 547 (1950).

In the initial Board proceedings, on the stipulated facts and consistent with Board law, ALJ Gerald A. Wacknov found on July 28, 2014, that the IBEW had violated Section 8(b)(4)(i) and (ii)(B) of the Act. All of the parties filed exceptions and the Board proceeded by a three-member panel. By the panel's December 27, 2018, Decision and Order, Chairman John Ring and Member Marvin Kaplan

affirmed the ALJ's July 28, 2014, Decision that the IBEW had violated the *Moore Dry Dock* rule, with Member Lauren McFerran dissenting.[1] *International Brotherhood of Electrical Workers, Local Union 357, AFL-CIO and Desert Sun Enterprises Limited, d/b/a Convention Technical Services*, Case No. 28-CC-115255, 367 NLRB No. 61.

Specifically, the majority observed that "[u]nusually, both the General Counsel and the Respondent argued to the judge and then to the Board that the Board should overrule its decades-old unqualified-threat rule," but nonetheless concluded that the *Moore Dry Dock* standard should be retained as its enforcement is justified by Congress's concern that neutral employers remain free from entanglement in the labor disputes of others. *Id.*, at p. 1. According to the Board majority, the IBEW violated the Act by threatening to engage in common-situs picketing without assuring the neutral employer that its picketing would be lawful. The Board concluded that the following circumstances, taken together, amounted to a violation of §8(b)(4)(B): "the locale of the threatened picketing (a worksite shared by the primary employer and one or more neutral employers), the target of the picketing (one of the neutrals), and the threat's unqualified and therefore ambiguous nature (leaving the neutral uncertain whether picketing at the common situs will be lawfully

[1] Board Member McFerran's term expired as of December 16, 2019. *See* 12/16/17 Reuters Legal 22:39:19 (2009).

confined to the primary or will unlawfully enmesh the neutral)…." Decision and Order, p. 2. The Board noted that the IBEW's letter was copied to the Convention Center's manager, representatives of which might read the threat as an intent to engage in picketing designed to disrupt all of its operations and not just the work of the charging party. The Board emphasized that it was merely "prohibiting unions from issuing an unqualified threat to engage in common situs picketing" and that it did "not expect unions to necessarily cite *Moore Dry Dock* or use any specific legalese." Instead, the Board explained that the union must clarify "in some manner that it will comply with legal limitations on common situs picketing so as to not entangle neutrals." Decision and Order, p. 3. Member McFerran's dissent concluded that "the Board's *Moore Dry Dock* assurances rule must be overruled as contrary to the Act." Decision and Order, Dissent, at p. 4, §II.

The IBEW petitioned this Court for review, naming both CTS and the Board as Respondents. On April 4, 2019, the Court granted the Board's unopposed motion (DKT 15), to consolidate Cases Nos. 19-70322 and 19-70575. On April 24, 2019, the Board moved for initial hearing en banc (DKT 17).

On December 13, 2019, the Court denied the Board's motion to proceed en banc, explaining that "No judge has requested a vote to hear this case initially en

banc within the time allowed by GO 5.2(a)" and concluding the "petition for initial hearing en banc (Docket Entry No. 17) is therefore denied."[2] DKT 43.

On January 6, 2020, without CTS's knowledge or consent, the Board filed its "Motion… Consenting to an Entry of Judgment against the Board." DKT 47. The Motion explains that the Board and the IBEW now consent to entry of judgment against the Board, in alleged reliance on and with the purpose that two prior Ninth Circuit ***panel*** decisions, *United Association of Journeymen & Apprentices of the*

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[2] GO 5.2 ("Initial Hearing En Banc"), states in pertinent part at subsection (a):

Petition by a Party Prior to Calendaring

Pursuant to Fed.R.App. P. 35(c), a petition requesting that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. The Clerk shall (1) enter the receipt or filing of a petition for an initial hearing en banc, (2) send copies to the En Banc Coordinator and the appropriate case management attorney, and (3) send copies of the briefs to the case management attorney upon completion of briefing. (*Rev. 12/13/10; 3/21/18)*

As soon as possible after completion of briefing the attorney shall prepare for the En Banc Coordinator a memorandum setting forth the facts and issues of the case. The En Banc Coordinator shall promptly notify all judges that a party has petitioned for an initial hearing en banc, but that the case will be calendared before a three-judge panel unless a judge makes an en banc call. The En Banc Coordinator shall distribute the attorney's memorandum and may also distribute an independent evaluation of the matter. Any judge may call for en banc within 14 days after receipt of notice from the En Banc Coordinator. *(Rev. 12/13/10)*

The En Banc Coordinator shall notify the Clerk and attorney of the rejection of the petition when either (1) no judge calls for a vote on the petition, or (2) upon a vote, there is no majority in favor of en banc consideration. Upon notification, the Clerk shall enter an order rejecting the petition. *(Rev. 12/13/10; 9/17/14)*

Plumbing & Pipefitting Industry, Local 32 v. NLRB, 912 F.2d 1108 (9th Cir. 1990), and *NLRB v. Ironworkers Local 433,* 850 F.2d 551 (9th Cir. 1988), remain unchallenged – although, in fact, another Ninth Circuit panel has already challenged the panel's 1988 decision in *Local 433*[3] and nothing prevents the Board from refining its interpretation of the *Moore Dry Dock* standards.

As explained below, the Board is not entitled to dismissal of these Circuit ***panel*** proceedings based on the Circuit's 1988 and 1990 ***panel*** decisions and/or the Board's mistaken statement "that enforcement of the Board's Order is foreclosed by binding circuit precedent." Instead, as set forth below, the Board, with primary responsibility for developing and applying the nation's labor policy, is authorized to develop and apply the nation's labor law and its December 27, 2018, Decision and Order in this matter is within its authority and is entitled to respect and enforcement under the law of this Circuit.

I. THE NINTH CIRCUIT PANEL DECISIONS CITED BY THE BOARD DO NOT SUPPORT THE COURT'S REFUSAL TO ENFORCE THE BOARD'S NEW INTERPRETATION

The Board bears "primary responsibility for developing and applying national labor policy." *Unite Here! Local 5 v. NLRB,* 768 Fed. Appx. 627, 628 (9th Cir. 2019), *quoting NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Courts

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[3] See *NLRB v. Musicians Union, AFM Local 6*, 960 F.2d 842, 844-45 (9th Cir. 1992), discussed *infra.*

should depart from the Board's interpretation of the NLRA only if the Board's interpretation is "not 'reasonably defensible.'" *Southern California Painters & Allied Trade District Council No. 36 v. Best Interiors, Inc.*, 359 F.3d 1127, 1132 (9th Cir. 2004) (*quoting NLRB v. Gen. Truck Drivers, Local No. 315),* 20 F.3d 1017, 1021 (9th Cir. 1994), *quoting NLRB v. United Union of Roofers, Local 81*, 915 F.2d 508, 510 (9th Cir. 1990), and *citing Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (noting this Circuit's "deference to the NLRB's interpretation" of the NLRA).

Congress endowed the Board with the authority to announce new principles in its discretion. *NLRB v. Children's Baptist Home of So. California*, 576 F.2d 256, 260 (9th Cir. 1978), *quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("'[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and adjudication lies in the first instance within the Board's discretion.'"). *Children's Baptist Home*, *citing NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-66 (1975), emphasizes that the Board has the inherent authority to adapt the nation's labor laws over time:

> Periodic changes in public policy by executive branch officers… are an inherent aspect of a democratic political system. With respect to our national labor policy, some degree of change is essential to keep that policy responsive to the problems of complex industrial life. As the Supreme Court has observed,
>
> > '[t]he use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions (freeze) the development of… important

> aspect(s) of the national labor law would misconceive the nature of administrative decision-making.' 'Cumulative experience' begets understanding an insight by which judgments… are validated or qualified or invalidated….'
>
> The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.

According to this Circuit, Board decisions are not easily upset. *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997) ("We defer to the Board's interpretation of the Act if it is 'reasonably defensible.' …. Courts of appeal should not substitute their judgment for that of the Board when deciding how best to remedy the effects of unfair labor practices."); *United Nurses Associations of California v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) ("The Board is vested with 'broad discretion to devise remedies that effectuate the policies of the Act.' …. We therefore review the Board's remedial order only for 'a clear abuse of discretion, … meaning that the Board's remedial order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'").

The motion of the Board's Acting Deputy Associate General Counsel does not meet the burden necessary to upset the long-standing Board decision in *Moore Dry Dock* as modified by its December 27, 2018, Decision in the CTS case.

II. INITIAL EN BANC REVIEW IS UNNECESSARY IN THIS MATTER

Panel review of the matters presented by the three cases is proper.[4] *Mesa Verde Construction Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1134-36 (9th Cir. 1988), explains in the context of a challenge to an NRLB decision that the appellate court should defer to the Board's interpretation if it is reasonable and that the Board is itself free to change its interpretation of the law it oversees:

> Both the Board and the circuit courts are charged with interpreting the NLRA and other labor laws. As noted, ***the Board's interpretation of its statutory mandate is entitled to deference***. Also, ***the Board is free to change its interpretation of the law if its interpretation is reasonable and not precluded by Supreme Court precedent***. ***We should defer to its judgment if reasonable***.
> …. [W]e recognize the deferential nature of judicial review of administrative decision-making…. We hold… that if prior decisions of this court constitute only deferential review of NLRB interpretations of labor law, and do not decide that a particular interpretation of statute is the only reasonable interpretation…, ***subsequent panels of this court are free to adopt new and reasonable NLRB decisions without the requirement of en banc review***.
> ***Our holding is consistent with this and other circuits' past adoption of NLRB decisions which conflicted with prior circuit case law***….
> …. As the Supreme Court recently recognized in *Chevron*, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. 467 U.S. at 844, 104 S.Ct. at 2782. This is especially true 'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency

[4] *See* DKT 32 in Case No. 18-16244 which was filed on March 21, 2019.

> regulations.' *Id*.... ***Deference is due even when the administrative agency changes its interpretation of statutes***. [Citation omitted.]
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> In summary, ***if a panel finds that a NLRB interpretation of labor laws is reasonable and consistent with those laws, the panel may adopt that interpretation even if circuit precedent is to the contrary***.... [Emphasis added.]

Indeed, in *NLRB v. Musicians Union, AFM Local 6*, 960 F.2d 842, 845 (9th Cir. 1992), this Court's panel (consisting of Circuit Judges Poole, Reinhardt and Fernandez) rejected the Board's reliance on *NLRB v. Ironworkers Local 433*, 850 F.2d 551 (9th Cir. 1988) – one of the authorities cited in the Board's pending motion. That case explains:

> The Union's reliance on Ironworkers is misplaced. Here, the NLRB did not make any presumption based upon the Union's threat to picket. Rather the NLRB reasonably relied on the plain language of the actual picket signs to infer that the object of the Union's picketing was to force Lewis, a self-employed person, to join the Union – an unlawful objective under 8(b)(4)(ii)(A). The picket signs first indicated that Lewis is a 'Non-Union Musician' and then stated that Lewis was unfair to Musicians Union, Local 6.' They also stated that the Union had no argument with any other person or employer. From this, it was fair to infer that the Union did have a dispute with Lewis. It is also fair to infer that the reason that the Union considered Lewis unfair was that he was not a member. Thus, it follows that the Board legitimately inferred that the dispute that underlay the picketing was over Lewis's refusal to join the Union, and that there was substantial evidence in the record supporting the Board's finding of an unlawful objective.
>
> Under 8(b)(4)(ii)(A), once the Board established the fact that ***an*** objective of the picketing was to force an employer or self-employed person to join the Union, a violation is proven. It does not matter whether the Union had additional objectives. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689, 71 S.Ct. 943, 951, 95 L.Ed. 1284 (1951). Therefore the Board's finding of an unlawful objective –

> that ***a*** purpose was to force Lewis to join the Union – was sufficient to establish violation of section 8(b)(4)(ii)(A). [Emphasis supplied.]

This reasoning supports the decision of Chairman Ring and Member Kaplan in favor of CTS and the long-standing policy of Congress to ensure that "neutral employers remain free from entanglement of the labor disputes of others." 367 NLRB No. 61, at p. 2. Former Member McFerran's dissenting observation that the majority's reliance on the *Moore Dry Dock* assurances is outdated is not even pertinent given the fact that Chairman Ring and Member Kaplan rejected the necessity of a recitation of the *Moore Dry Dock* assurances or the citation of *Moore Dry Dock* itself to invoke its protections.

CTS was the charging party. Its position was accepted by the ALJ and by the majority of the Board's panel.[5] CTS's position has been the Board standard on the issue presented for over 50 years. The Board, per Chairman Ring, agreed that "an unqualified picketing threat communicated to a neutral at a common situs is an ambiguous threat, and such an ambiguous threat enables a union to achieve the proscribed objective of coercing the neutral employer to cease doing business with the primary employer – the very object a union seeks to achieve when it makes a blatantly unlawful threat to picket or unlawfully pickets a neutral." For the Board,

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[5] *See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217-222 (1965) (describing the general right of the charging party to intervene in judicial proceedings upon review).

through its Acting Deputy Associate General Counsel, to now endeavor to stipulate-away the Court's consideration of the Board's updated application of the *Moore Dry Dock* standards in this consolidated action is itself unseemly, unjust and inappropriate. No decision of this Circuit supports the Board's motion.

III. CONCLUSION

The Board's motion does not explain why, after filing an unfair labor practice charge, participating in an investigation of the charge, and having a complaint issue and proceed to litigation, the Board would side with the losing respondent.[6] Nor is there any precedent requiring that the review of the Board's decision at issue be made en banc. The Board and IBEW should not be permitted to stipulate to the dismissal of Cases Nos. 19-70322 and 19-70575– now fully briefed by CTS and IBEW and subject to the March 21, 2019, Order of this Court -- without the consent of CTS, the charging party and real party in interest in the proceedings before this Court. The Court should proceed with consideration of this dispute on the merits

[6] The Board's position contrary to enforcement of its own Decision and Order in this case is particularly disconcerting given its position in support of enforcement of *Moore Dry Dock* through Board counsel (including Acting Deputy Associate General Counsel David Habenstreit) in other appellate proceedings in this Circuit. *See* 11/1/19 Brief for the NLRB in Case No. 19-70334, "Service Employees International Union Local 87, Petitioner, v. National Labor Relations Board, Respondent," 2019 WL 5864117 (DKT 40, at pp. 37 and 40, stressing the applicability of the *Moore Dry Dock* standards to the common situs picketing dispute at issue).

and enforce the Board's December 27, 2018, Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), CTS certifies that its Opposition contains 3,135 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. CTS further certifies that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free.

Dated: January 16, 2020.

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STATEMENT OF RELATED CASES

The Cases addressed herein are related to Case No. 18-16244. In Docket Entry 32 of that case, this Court ordered that that case and these cases be calendared before the same merits panel.

Dated: January 16, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on the following:

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